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IN THE

Supreme Court of the United States

October Term NO. 337

ALEXANDER NORWOOD, *Petitioner*

vs.

HONORABLE WILLIAM H. KIRKPATRICK, etc.

JOSEPH F. TUNSTALL, *Petitioner*

vs.

HONORABLE WILLIAM H. KIRKPATRICK, etc.

JOHN E. SMALLWOOD, *Petitioner*

vs.

HONORABLE WILLIAM H. KIRKPATRICK, etc.

BRIEF FOR PETITIONERS-APPELLANTS

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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania is not reported. A copy of this opinion appears in the record pp. 11-14. No opinion of the United States Court of Appeals for the Third Circuit was filed.

JURISDICTION

The order of the Court of Appeals for the Third Circuit was entered on July 16, 1954. A petition for a rehearing was denied on August 24, 1954. The jurisdiction of this Court is invoked under C. 646, Act of June 25, 1948, 62 Stat. 928 U. S. C. A., Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Is not Title 28 U. S. C. Section 1404(a), which was passed for the express purpose of allowing the federal courts to apply the doctrine of *forum non conveniens*, subject to the restrictions of *forum non conveniens?*

2. Is not mandamus a proper remedy where a federal district court judge has been forced against his will to follow an erroneous ruling of his Court of Appeals and therefore transfer a case under Title 28 U. S. C. Section 1404(a), since an appeal after the trial of the case is clearly an inadequate remedy which provides no remedy at all?

STATUTES INVOLVED

Act of June 25, 1948, C. 646, 62 Stat. 937, Title 28 U. S. C., §1404(a), which reads:

"§1404. *Change of venue*

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer

any civil action to any other district or division where it might have been brought."

* * * * * * * * *

Act of April 22, 1908, C. 149 §6, 35 Stat. 66 as amended June 25, 1948, C. 646, §18, 62 Stat. 989, Title 45 U. S. C., §56, which reads:

> "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

STATEMENT OF THE CASE

These are actions under the Federal Employers' Liability Act, Title 45 U. S. C., Section 51, et seq., to recover damages for serious injuries suffered by the plaintiffs as a result of the derailment of an Atlantic Coast Line train near Dillon, South Carolina. Suits were instituted on behalf of these plaintiffs in the United States District Court for the Eastern District of Pennsylvania (1, 3, 5) which had jurisdiction by virtue of Title 45 U. S. C., Section 56. (1, 3, 5) Defendant filed motions to dismiss, or, in the alternative, to transfer, under Title 28 U. S. C., Section 1404(a), to the United States District Court for the Eastern District of South Carolina, Florence Division. (1, 3, 5) After argument had and affidavits filed, the Honorable William H. Kirkpatrick, on July 12, 1954, filed an opinion denying the motion to dismiss and granting the motion to transfer. (11-14)

The accident eventuating in the district court actions was the result of a derailment of a train in whose operation plaintiffs were not concerned. They were confined to, and

treated in, various hospitals, and were treated by a number of different doctors. However, the greater number of hospitals in which they were confined and treated, and the greater number of presently treating physicians, are located either in the Eastern District of Pennsylvania or in Washington, D. C., the latter, of course, being much closer to the Eastern District of Pennsylvania than to Florence, South Carolina. (14)

Petitioner Norwood resides in the Eastern District of Pennsylvania, where he brought suit (Chester, Pa.). (14)

Two of the petitioners (Smallwood and Tunstall) reside in Washington, D. C. (14)

It is proposed to transfer their cases to Florence, South Carolina. (1, 3, 5)

All of them are Negroes, (18) who prima facie will fare better in Philadelphia than in Florence, South Carolina.

Your petitioners filed an application in the Court of Appeals for the Third Circuit on July 13, 1954, for a writ of mandamus or prohibition, or both, directed to the District Court Judge. (1, 3, 5) This was denied on July 16, 1954. (7, 8) A petition for a rehearing was denied on August 24, 1954. (20, 21) A petition for a writ of certiorari was filed from the denial of the application for the writ of mandamus or prohibition, or both. Certiorari was granted on November 8, 1954. (22)

In granting the motion to transfer, the lower Court said: (12)

> "It is quite clear that the Court of Appeals for this Circuit holds that the discretion vested in the District Court to order a transfer under Title 28 U. S. C., Sec. 1404(a) is very much broader than I thought it was when I decided Naughton v. Pennsylvania R. Co., 85 F. Supp. 761. See All States Freight v. Modarelli, 196 F. 2d 1010. *It makes a difference in this case, because if the stringent requirements of the doctrine of forum non conveniens found in the decisions of the Supreme Court prior to the statute are to be*

applied I would feel that none of the three cases could properly be transferred. As it is, I think that the balance of convenience in all three cases is sufficiently in favor of the defendant to make the transfer proper." (Emphasis supplied.)

Thus, admittedly, the District Court Judge would have refused the motion to transfer had he not been forced to the contrary by the decision of the Court of Appeals for the Third Circuit, in *All States Freight v. Modarelli*, 196 F. 2d 1010 (C. A. 3, 1952), where that Court said, at page 1011:

"In the first place some district judges are applying section 1404(a) with a limitation imposed by the Supreme Court upon the doctrine of *forum non conveniens* as found in the Gulf Oil and Koster decisions.

"[2] The *forum non conveniens* doctrine is quite different from Section 1404(a). That doctrine involves the dismissal of a case because the forum chosen by the plaintiff is so completely inappropriate and inconvenient that it is better to stop the litigation in the place where brought and let it start all over again somewhere else. It is quite naturally subject to careful limitation for it not only denies the plaintiff the generally accorded privilege of bringing an action where he chooses, but makes it possible for him to lose out completely, through the running of the statute of limitations in the forum finally deemed appropriate. Section 1404(a) avoids this latter danger. *Its words should be considered for what they say, not with preconceived limitations derived from the forum non conveniens doctrine.*" (Emphasis supplied.)

SUMMARY OF ARGUMENT

This case logically is separated into two sections. In the first section our argument is, in summary, that:

The District Court Judge in exercising his discretion would *not* have transferred these cases except for the fact that the Third Circuit in *All States Freight v. Modarelli*, 196 F. 2d 1010, (C. A. 3, 1952) held that section 1404(a) of the judicial code was *not* subject to the established limitations of the doctrine of *forum non conveniens*. Our argument proceeds from that to show that the legislative history of section 1404(a), the decisions of this Court, the decisions of other Circuit Courts, and the relationship between section 1404(a) and section 6 of the Federal Employers' Liability Act (45 U. S. C. A. §56) undeniably show that section 1404(a) is a codification of the doctrine of *forum non conveniens* and nothing more.

In the second section we argue, in summary, that:

An order granting a transfer being interlocutory is not appealable. An appeal after trial of a cause raising the question of the propriety of an order granting transfer is no remedy at all since the person ruled against cannot show prejudice. Therefore, under the decisions of this Court stating when mandamus is available, under the cases of this Court which hold that section 6 of the Federal Employers' Liability Act gave these petitioners who are railroaders a "substantial right", and under the decisions of many Circuit Courts they are entitled to the only remedy available to them to review an incorrect interpretation of section 1404(a)—namely, mandamus.

ARGUMENT

I. Title 28 U. S. C., 1404(a) was passed by Congress for the express purpose of allowing the Federal Courts to apply the doctrine of Forum Non Conveniens, and is subject to the limitations of Forum Non Conveniens.

These cases would be tried in Philadelphia, Pennsylvania, rather than Florence, South Carolina, if the trial judge had not been *compelled* to transfer them to the United States District Court for the Eastern District of South Carolina, against his will and his sense of justice by the rulings of the Court of Appeals in his circuit.

No matter what may be said of the numerous other cases which arise by virtue of motions to transfer under Title 28 U. S. C. 1404(a), admittedly, in these present cases, the motions for transfer would not have been granted if the law is that Title 28 U. S. C. 1404(a) is subject to the limitations of *forum non conveniens.* This is clearly set forth in the opinion of the Honorable William H. Kirkpatrick, Chief Judge of the United States District Court for the Eastern District of of Pennsylvania, where he said:

> " 'It is quite clear that the Court of Appeals for this Circuit holds that the discretion vested in the District Court to order a transfer under Title 28 U. S. C., Sec. 1404(a) is very much broader than I thought it was when I decided Naughton v. Pennsylvania R. Co., 85 F. Supp. 761. See All States Freight v. Modarelli, 196 F. 2nd 1010. *It makes a difference in this case, because if the stringent requirements of the doctrine of forum non conveniens found in the decisions of the Supreme Court prior to the statute are to be applied I would feel that none of the three cases could properly be transferred.* As it is, I think that the balance of convenience in all three cases is sufficiently in favor of the defendant to make the transfer proper.' " (Emphasis supplied.)

In other words, it is quite clear that the transfer of these cases would have been denied by the district court judge if the United States Court of Appeals for the Third Circuit had not held that Section 1404(a) was not subject to the restrictions of *forum non conveniens*, as it did in *All States Freight v. Modarelli*, 196 F. 2d 1010 (C. A. 3, 1953).

In that case the Third Circuit said, at page 1011:

> "In the first place some district judges are applying Section 1404(a) with a limitation imposed by the Supreme Court upon the doctrine of *forum non conveniens* as found in the Gulf Oil and Koster decisions.
>
> "[2] The *forum non conveniens* doctrine is quite different from Section 1404(a). That doctrine involves the dismissal of a case because the forum chosen by the plaintiff is so completely inappropriate and inconvenient that it is better to stop the litigation in the place where brought and let it start all over again somewhere else. It is quite naturally subject to careful limitation for it not only denies the plaintiff the generally accorded privilege of bringing an action where he chooses, but makes it possible for him to lose out completely, through the running of the statute of limitations in the forum finally deemed appropriate. Section 1404(a) avoids this latter danger. *Its words should be considered for what they say, not with preconceived limitations derived from the forum non conveniens doctrine.*" (Emphasis supplied.)

It is equally clear that such interpretation by the Court of Appeals for the Third Circuit is in direct conflict with the interpretation of Section 1404(a) by all three other circuits that have considered the question.

These Courts of Appeals have held that Title 28 U. S. C., Section 1404(a) is subject to the limitation of *forum non conveniens*.

In *Ford Motor Co. v. Ryan*, 182 F. 2d 329 (C. A. 2, 1950), Judge Frank said, at page 330:

> "We *think that, by* § 1404(a), *Congress did not alter the standard theretofore embodied in the doctrine of forum non conveniens*, despite the fact that that section is applicable to types of actions to which that doctrine did not previously apply. So we read Ex Parte Collett, 337 U. S. 55, 69 S. Ct. 944, 959, 10 A. L. R. 2nd 921, and United States v. National City Lines, 337 U. S. 78, 69 S. Ct. 955, 10 A. L. R. 2d 921. On that basis *these words found in Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 508, 67 S. Ct. 839, 843, 91 L. Ed. 1055, *still have full vitality: 'But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.'* Those words we interpret to mean (a) that a defendant has the burden of making out a strong case for a transfer and (b) *that the plaintiff's privilege, conferred by statute, of choosing the forum he selected is a factor to be considered* as against the 'convenience' of the witnesses or what otherwise might be the balance of 'convenience' as between 'the parties'." (Emphasis supplied.)

In *Nicol v. Koscinski*, 188 F. 2d 537 (C. A. 6th, 1951), the Court of Appeals for the 6th Circuit decided that Section 1404(a) was subject to the limitations of the doctrine of *forum non conveniens* and said at p. 537:

> "It is clear that whether the order stands or is set aside, one of the litigants will be inconvenienced, and it became the duty of the district judge to balance inconveniences and to determine upon which litigant the greater hardship would rest, if he granted change of venue, and that determination was subject to the rule that *unless the balance is strongly in favor of the defendant the plaintiff's choice of forum should rarely be disturbed.*" (Emphasis supplied.)

In *Wiren v. Laws*, 194 F. 2d 873 (U. S. C. A. District of Columbia, 1951), the Circuit Court again applied the restriction of *forum non conveniens* to a determination of the question of transfer under Section 1404(a). The court said at p. 874:

> "Those criteria, applied to the §1404(a) situation, have been set out by Judge Frank in Ford Motor Co. v. Ryan, 2 Cir., 1950, 182 F. 2d 329, 330. After pointing out that the question is 'whether the judge abused his discretion,' he continues: '* * * by §1404(a), Congress did not alter the standard theretofore embodied in the doctrine of *forum non conveniens*, despite the fact that that section is applicable to types of actions to which that doctrine did not previously apply. So we read Ex parte Collett, 337 U. S. 55, 69 S. Ct. 944, 959, [93 L. Ed. 1207] 10 A. L. R. 2d 921, and United States v. National City Lines, 337 U. S. 78, 69 S. Ct. 955, [93 L. Ed.] 1226, 10 A. L. R. 2d 921. On that basis, these words found in Gulf Oil Corp. v. Gilbert, 330 U. S. 501, 508, 67 S. Ct. 839, 843, 91 L. Ed. 1055, still have full vitality: "But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." Those words we interpret to mean (a) that a defendant has the burden of making out a strong case for a transfer and (b) that the plaintiff's privilege, conferred by statute, of choosing the forum he selected is a factor to be considered as against the "convenience" of witnesses or what otherwise might be the balance of "convenience" as between "the parties".'"

Indeed, the Third Circuit itself recognized that many of the District Courts and Courts of Appeals were applying the limitations of *forum non conveniens* to Section 1404(a), and that it was in conflict with these other courts. It said

in *All States Freight v. Modarelli*, 196 F. 2d 1010 (C. A. 3, 1953) at p. 1011:

> "In the first place some district judges are applying section 1404(a) with a limitation imposed by the Supreme Court upon the doctrine of *forum non conveniens* as found in the Gulf Oil and Koster decisions."

and at p. 1012:

> *"We realize that the view we express is not the one which some of our judicial brethren are following with regard to this statute."* (Emphasis supplied.)

Having stated this history of the litigation of the instant cases and the present situation with respect to the interpretation of Section 1404(a) in the Courts of Appeals, we turn now to the crucial issue before the Court. Simply it is: Did not Congress intend to make the established, well recognized, and clearly delineated doctrine of *forum non conveniens* as declared in *Gulf Oil Corporation v. Gilbert*, 330 U. S. 501, 67 S. Ct. 839 (1946), applicable to the federal courts when it adopted Section 1404(a) to Title 28?

It is not difficult to determine the answer to this issue for the legislative history of the Act is set forth at great length and with exacting detail in this court's opinion in *Ex Parte Collett*, 337 U. S. 55, 69 S. Ct. 944 (1949).

This legislative history shows beyond any peradventure of doubt that this section was no more than an adoption of *forum non conveniens*. It shows that Congress *did not intend* to unsettle the law and evolve entirely new principles controlling the question of transferring actions but merely thought it advisable to give the federal courts the power to transfer cases when, under the established principles of *forum non conveniens*, it was wise to so do.

This Court is well aware of the persons and time in-

volved in preparing the Code. *Ex Parte Collett*, 337 U. S. 55, 65, 66, 69 S. Ct. 944, 949, 950 (1949):

> "This was scarcely hasty, ill-considered legislation. To the contrary, it received close and prolonged study. Five years of Congressional attention supports the Code. And from the start, Congress obtained the most eminent expert assistance available. The spadework was entrusted to two lawbook-publishing firms, the staffs of which had unique experience in statutory codification and revision. They formed an advisory committee, including distinguished judges and members of the bar, and obtained the services of special consultants. Furthermore, an advisory committee was appointed by the Judicial Conference. And to assist with matters relating to the jurisdiction of this court, Chief Justice Stone appointed an advisory committee, consisting of himself and Justices Frankfurter and Douglas."

The most important clue to the solution of issue now before the Court is found in the reviser's note to this important action and its history in the path of the bill through Congress. Such reviser's note reads:

> "'*Subsection (a) was drafted in accordance with the doctrine of forum non conveniens*, permitting transfer to a more convenient forum even though the venue is proper. As an example of the need of such a provision, see Baltimore & Ohio R. Co. v. Kepner, 1941, 314 U. S. 44, 62 S. Ct. 6, 86 L. Ed. 28, which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the Court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so.'" (Emphasis supplied.)

Again, the history of these notes is clearly explained in *Ex Parte Collet*, 337 U. S. 55, 68-71, 69 S. Ct. 944, 951-952, (1949):

> "The initial appearance of §1040(a) was in the Second Draft of the Code, adopted by the meeting of May, 1945. Its text has remained unchanged. It was accompanied by a reviser's note, which recited that 'Subsection (a) is new. It was drafted in accordance with a memorandum of March 7, 1945, from the author of Moore's Federal Practice, stating that recognition should be given the doctrine of *forum non conveniens.* * * *' The balance of that note was substantially the same as the present reviser's note; it expressly cited the Kepner case, an action under the Federal Employers' Liability Act as demonstrating the need for §1404(a). *And the reviser's notes were before the Congress at every subsequent legislative step.*
>
> "A preliminary draft of the Code was printed late in 1945 for the use of the House Committee on Revision of the Laws. In this draft, the reviser's notes appear directly below each related section or subsection. Section 1404(a) and its note were in this draft, which, as noted above, was given very wide circulation.
>
> "July 24, 1946, the House ordered to be printed the Report submitted by Representative Keogh of New York, Chairman of the House Committee on Revision of the Laws, on the codification of Title 28. This Report consisted of a preliminary statement *and a full printing of the reviser's notes.* Section 1040(a) appears in that Report, together with its note. There was no further action on the Code in the Seventy-Ninth Congress.
>
> "In the Eightieth Congress, under the Legislative Reorganization Act of 1946, the Code revision passed to the jurisdiction of the House Judiciary Committee and was assigned to a Subcommittee of which Repre-

sentative Robinson of Kentucky was Chairman. At the hearing before this Subcommittee, Professor James William Moore of Yale University, special consultant to the revisers, in summarizing the Code proposals, testified that there were 'changes of importance' in the law of venue and specifically mentioned §1404. In April, 1947, the House Judiciary Committee reported the bill with a unanimous recommendation that it be passed. This Report *again fully reprinted the reviser's notes.* In this Report, the section entitled 'Examples of Cnanges in Law,' which had appeared in the Report on the revision in the preceding Session of Congress, expressly referred to the reviser's notes for §§1391-1406.

"After this painstaking consideration, with its references to §1404(a), the House initially passed the bill on July 7, 1947. At that time and in the subsequent consideration in the Senate, the Tax Court provisions occasioned the most discussion; but other specific sections did not pass unnoticed. Attention was directly called to §1404(a) by one witness at the hearings before the Senate Judiciary Subcommittee, although his interest was not in the Federal Employers' Liability Act issue. No change in §1404(a) was included in the Senate amendments; and the revision of Title 28 was enacted by the Congress in June 1948.

"Thus, at almost every stage of the legislative procedure, attention was directed to the fact of change, and in most instances specific mention was made of §1404(a). *At no stage subsequent to the first formal printing did §1404(a) and its accompanying reviser's note fail to appear.* From the start, §1404(a) remained the same, and the reference in the note to a Federal Employers' Liability Act case as showing the need for permitting the application of *forum non conveniens* remained unchanged. Not to hold that Congress did not appreciate what it was enacting in

> that section would defy the legislative history. We must flatly reject petitioner's thesis that this section was so obscured that its enactment is meaningless. We cannot blind ourselves to the hearings, to the experts, to the Committee reports, to the reviser's notes and their incorporation in the Committee reports—to a history of the most meticulous Congressional consideration." (Emphasis supplied.)

To decide now that the principles and limitations of *forum non conveniens* do not apply this court must necessarily refuse to consider the reviser's notes which were relied upon so heavily in *Ex Parte Collett.*

Furthermore, as recently as April 1953, your Honorable Court in *Pope v. Atlantic Coast Line R. Co.*, 345 U. S. 379, 73 S. Ct. 749 quoted in Footnote 10, p. 385, the reviser's note which said:

> "'Subsection (a) was drafted *in accordance with the doctrine of forum non conveniens*, permitting transfer to a more convenient forum, even though the venue is proper.'" (Emphasis supplied.)

These reviser's notes are important and conclusive of the intent of Congress. There is no reason to destroy such intent to give the district court judges more power than Congress intended. Indeed, on the other hand, there is real reason to permit Congress' intent to be carried out. Indeed, if the special venue provisions of the Federal Employers' Liability Act, 45 U. S. C. A. 51 et seq. which this Court in *Pope v. Atlantic Coast Line, supra*, and *Boyd v. Grand Trunk Western R. Co.*, 338 U. S. 263, 70 S. Ct. 26 (1949), held still the law and binding on the courts, is to truly afford the injured railroad employee any choice of venue, this self arrogation of power to limit jurisdiction must be conclusively thwarted.

It is undoubtedly true that this Court, the Second Circuit, the Sixth Circuit, and the Court of Appeals for the District of Columbia have correctly interpreted §1404(a)

as subject to the same limitations as are found in the doctrine of *forum non conveniens*. Whatever may be said of other types of actions, employees bringing suit under the Federal Employers' Liability Act were given a "substantial right" to select their forum by Section 6 of the Federal Employers' Liability Act. Indeed, your Honorable Court, in *Boyd v. Grand Trunk Western R. Co.*, 338 U. S. 263, 70 S. Ct. 26 (1949), held that the venue rights afforded by Section 6 of the Federal Employers' Liability Act were so strong that they could not be contracted away and said (p. 266) (70 S. Ct. 28):

> "And nothing in Ex parte Collett, 1949, 337 U. S. 55, 69 S. Ct. 944, affects the initial choice of venue afforded Liability Act plaintiffs. We state expressly that the section of the Judicial Code there involved, 28 U. S. C. §1404(a), 28 U. S. C. A. §1404(a), *'does not limit or otherwise modify any right granted in §6 of the Liability Act or elsewhere to bring suit in a particular district.* An action may still be brought in any court, state or federal, in which it might have been brought previously.' 337 U. S. at page 60, 69 S. Ct. at page 947.
>
> "The right to select the forum granted in Section 6 is a *substantial right.*"

The interpretation which the Third Circuit has given Section 1404(a) not only limits and modifies the right granted in Section 6 of the Federal Employers' Liability Act, but destroys the "substantial right" given to such plaintiffs by such Section. The decision in *All States Freight Co. v. Modarelli*, supra, is a mandate to district court judges to refuse to recognize the plaintiff's choice of forum as a factor. Judge Frank, in *Ford Motor Co. v. Ryan*, 182 F. 2d 329 (C. A. 2, 1950), said, at page 330:

> " * * * We think that, by §1404(a), Congress did not alter the standard theretofore embodied in the

doctrine of *forum non conveniens*, despite the fact that that section is applicable to types of actions to which that doctrine did not previously apply. So we read Ex Parte Collett, 337 U. S. 55, 69 S. Ct. 944, 959, 10 A. L. R. 2d 921, and United States v. National City Lines, 337 U. S. 78, 69 S. Ct. 955, 10 A. L. R. 2d 921. On that basis, these words found in Gulf Oil Corp. v. Gilbert, 330 U. S. 501, 508, 67 S. Ct. 839, 843, 91 L. Ed. 1055, still have full vitality: 'But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.' Those words we interpret to mean (a) that a defendant has the burden of making out a strong case for a transfer and (b) *that the plaintiff's privilege, conferred by statute, of choosing the forum he selected is a factor to be considered as against the 'convenience' of the witnesses or what otherwise might be the balance of 'convenience' as between 'the parties'.*" (Emphasis supplied.)

Compare, also, the language of Judge Learned Hand, in the same case, where he said, at p. 332:

"I wish to put my vote solely upon the ground that §15 of Title 15 U. S. C. A. gives to a plaintiff a privilege which a defendant must overcome by more than a bare balance of convenience between the two forums. If I thought that we had before us an unweighted choice between New York and Detroit, based upon that consideration, I should choose Detroit; indeed, I should think it a clear abuse of discretion to hold otherwise. *However, as I understand it, the privilege granted by §15 still counts in the scale:* a defendant must do more than show that the transfer will on the whole make the trial more convenient; it must make the trial markedly more convenient." (Emphasis supplied.)

It is this language which the Third Circuit rejects in the case of *All States Freight Co. v. Modarelli*, supra. If the "plaintiff's privilege, conferred by statute, of choosing the forum he selected" is rejected, as "a factor to be considered as against the convenience of witnesses or what otherwise might be the balance of convenience as between the parties", there is nothing left of the plaintiff's venue privileges under Section 6 of the Federal Employers' Liability Act.

The decision in *All States Freight Co. v. Modarelli*, supra, compels district court judges to choose *the most* convenient forum and transfer, upon motion, the case to that forum. Since there can be only one *most* convenient forum, this interpretation undoubtedly destroys all rights given to plaintiffs by Section 6 of the Federal Employers' Liability Act,[1] and forces them to litigate their cause, not in the "district of the residence of the defendant in which the cause of action arose, or in which the defendant is doing business"— the words of Section 6—but in only *one place: the* most convenient forum. As examples of this interpretation of the effect of the *Modarelli* decision, we point to *Paragon-Revolute Corp. v. C. F. Pease Co.*, 120 F. Supp. 488 (U. S. D. C., D. Del., 1954); *General Felt Products Co. v. Allen Industries, Inc.*, 120 F. Supp. 491 (U. S. D. C., D. Del., 1954), whereJudge Leahy, bound by the *Modarelli* decision, considered numerous forums and chose *the* most convenient one.

Chief Judge William H. Kirkpatrick also decided the case of *Naughton v. Pennsylvania R. Co.*, 85 F. Supp. 761 U. S. D. C. E. D. Pa., 1949). He there held that Section 1404(a) was subject to the limitation of the doctrine of *forum non conveniens* and said (pp. 763-764):

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[1] If it be thought that the forum for the trial of a case is of little practical importance in the administration of justice, it need only be pointed out that the three seriously injured petitioners involved in this case are negroes, who must, if the transfer is granted, try their cases before a jury in South Carolina.

"It is my opinion that, whatever inconvenience may result to the defendant from trying these cases in Philadelphia, it is not so great as to allow the Court, under the well established limitations of the doctrine forum non conveniens, to transfer the cases to Pittsburgh; nor do I think that the interests of justice imperatively require it if balanced against the importance of allowing the plaintiff freedom of choice among forums of unquestioned venue. After all, Section 6 of the Federal Employers' Liability Act was designed to give the injured employee a wide choice of forum in which to bring his action. It has not been repealed and the underlying policy remains and should be carried out whenever possible unless serious inconvenience or injustice to the defendant will result. *The view contended for by the defendant would come close to making Section 1404(a) a venue statute, under which the court, after striking a nice balance of conveniences, would be bound to limit the plaintiff to a single jurisdiction.* If that had been the purpose, the statute would have directed the courts to make transfers to the most convenient jurisdiction — a very different question from that involved in the doctrine of forum non conveniens." (Emphasis supplied.)

The interpretation there sought by the railroad company was directly contrary to your Honorable Court's decisions in *Ex Parte Collett*, supra; *Boyd v. Grand Trunk Western R. Co.*, supra; and *Pope v. Atlantic Coast Line R. Co.*, supra. In *Pope v. Atlantic Coast Line*, supra, this Court said, at pages 386, 387 (73 S. Ct. at page 753):

"Congress might have gone further; it might have vested state courts with the power asserted here. In fact, the same Congress which enacted §1404(a) *refused to enact a bill which would have amended §6 of the Federal Employers' Liability Act by limiting the*

employee's choice of venue to the place of his injury or to the place of his residence.

"This proposed amendment—the Jennings Bill—focused Congress' attention on the decisions of this Court in both the Miles and the Kepner cases. The broad question—involving many policy considerations—of whether venue should be more narrowly restricted, was reopened; cogent arguments—both pro and con—were restated. Proponents of the amendment asserted that, as a result of the Miles and Kepner decisions, injured employees were left free to abuse their venue rights under §6 and 'harass' their employers in distant forums without restrictions. They insisted that these abuses be curtailed.

"These arguments prevailed in the House which passed the Jennings Bill, but the proposed amendment died in the Senate Judiciary Committee, and §6 of the Federal Employers' Liability Act was left just as this Court had construed it."

Indeed, the former Governor of California and now Chief Justice of this Court spoke regarding an effort of the California Legislature, in 1953, to incorporate a doctrine of *forum non conveniens* into the law of that state. (Senate Bill No. 789.) In vetoing such bill, he said:

"If we are to whittle away in this manner the benefits conferred by the Federal Employers' Liability Act, it would soon lose *its national uniformity and could at least substantially weaken the purposes for which the act was originally designated.* I am not advised that other states have enacted such legislation. The fact that this act has been in effect since 1908 without similar legislation being enacted in other states would indicate a nationwide appreciation of the desirability for this uniformity. At all events if any of the provisions of the act result in a denial of justice to either plaintiffs or defendants, the situation could re remedied nationwide by a simple act of Congress." (Emphasis supplied.)

If Section 6 is to continue to have the vitality attributed to it by your Honorable Court, in consistent and unwavering decisions, the interpretations of Section 1404(a) by the Third Circuit in *All States Freight v. Modarelli*, supra, cannot be allowed to stand.

We turn now to the precise reason, and we submit the only reason advanced by the Third Circuit in *All States Freight v. Modarelli*, 196 F. 2d 1010 (C. A. 3, 1953) to disagree with all of the other Circuits that have considered the question:

> "In the first place some district judges are applying Section 1404(a) with a limitation imposed by the Supreme Court upon the doctrine of *forum non conveniens*, as found in the Gulf Oil and Koster decisions.
>
> "[2] The *forum non conveniens* doctrine is quite different from Section 1404(a). That doctrine involves the dismissal of a case because the forum chosen by the plaintiff is so completely inappropriate and inconvenient that it is better to stop the litigation in the place where brought and let it start all over again somewhere else. It is quite naturally subject to careful limitation for it not only denies the plaintiff the generally accorded privilege of bringing an action where he chooses, but makes it possible for him to lose out completely, through the running of the statute of limitations in the forum finally deemed appropriate. Section 1404(a) avoids this latter danger. *Its words should be considered for what they say, not with preconceived limitations derived from the forum non conveniens doctrine.*" (Emphasis supplied.)

It is quite clear that this reasoning proceeds upon the theory that the words of the statute are there and because nothing is said one way or the other in the statute about *forum non conveniens*, the limitation of *forum non conveniens* should not apply.

The question of statutory interpretation here involved

is not so simple. This is not a case where the statute is clear and unambiguous. *The statute here says nothing one way or the other concerning the limitations of forum non conveniens.* We are not here trying to use the Congressional history of the Act to make words mean something different from what they say: Cf. *Ex Parte Collett*, 337 U. S. 55, 69 S. Ct. 944 (1949), (where this Court, in the face of the words "any civil action" refused to make the statute inapplicable to suits under the Federal Employers' Liability Act). Rather, we are here attempting to determine Congressional intent concerning the principles to be used in applying the general words of the statute "convenience of parties and witnesses" and "interests of justice".

We submit that Congress in enacting this section of the Code merely used a shorthand method of expressing *forum non conveniens.* That it has so been regarded by all the other courts is undoubtedly true.

In *Ex Parte Collett*, 337 U. S. 55, 69 S. Ct. 944 (1949), your Honorable Court had before it the question of whether Section 1404(a) was applicable to Federal Employers' Liability cases. Chief Justice Vinson, in stating the question that was then before the Court, said, at page 56 (69 S. Ct., p. 945):

> "In this case we must decide whether the venue provisions of the Judicial Code *render applicable the doctrine of forum non conveniens to actions under the Federal Employers' Liability Act.*" (Emphasis supplied.)

This Court in the same case said at pages 57 and 58 (69 S. Ct., p. 946):

> "The reviser's notes, which accompany each section of the Code, here read as follows: '*Subsection (a) was drafted in accordance with the doctrine of forum non conveniens*, permitting transfer to a more convenient forum even though the venue is proper. As an

example of the need of such a provision, see Baltimore & Ohio R. Co. v. Kepner, 1941, 314 U. S. 44, 62 S. Ct. 6, 86 L. Ed. 28, which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the Court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so.' The precise issue before us is whether, despite these expressions, the law remains unchanged. Petitioner so contends." (Emphasis supplied.)

It is therefore apparent that the revisers of the Judicial Code clearly intended to make the doctrine of *forum non conveniens* applicable and nothing more. The whole tone and tenor of the opinion of *Ex Parte Collett* is one of a discussion of *forum non conveniens*, and does not, in any fashion, support the interpretation of Section 1404(a) which the Third Circuit has now decided to be the correct one. This Court said, in 337 U. S., at pages 60 and 61 (69 S. Ct. 947):

"The inapplicability of *forum non conveniens* to Liability Act suits derives from the Kepner decision. And there this Court expressly stated that 'If it is deemed unjust, the remedy is legislative * * *.' 314 U. S. at page 54, 62 S. Ct. at page 10, 86 L. Ed. 28. That opinion discusses §6 of the Liability Act, to be sure, but this Court did not and could not suggest that the legislative answer had necessarily to be addressed to that section. Since the words selected by Congress for §6 denote nothing, one way or the other, respecting *forum non conveniens*, there was no occasion to repeal that section, expressly or impliedly; Congress chose to remove its judicial gloss via another statute. Discussion of the law of implied repeal is, therefore, irrelevant."

and at page 65 (69 S. Ct., page 949):

> "His argument is obviously based not on the actual legislative history of §1404(a), but on necessarily vague speculation as to what Congress might have done had it fully realized that *forum non conveniens was henceforth to be applicable in Federal Employers' Liability Act suits.*" (Emphasis supplied.)

and at page 68 (69 S. Ct., page 951):

> "It was drafted in accordance with a memorandum of March 7, 1945, from the author of Moore's Federal Practice, stating that *recognition should be given the doctrine of forum non conveniens.* * * * " (Emphasis supplied.)

and, at page 71 (69 S. Ct., page 952):

> "From the start, Section 1404(a) remained the same, and the reference in the note to a Federal Employers' Liability Act case as showing the need for permitting the application of *forum non conveniens* remained unchanged."

This Court, in *Pope v. Atlantic Coast Line R. Co.*, 345 U. S. 379, 73 S. Ct. 749 (1953), reiterated its holding in *Ex Parte Collett*, at page 383 (73 S. Ct., page 751):

> "We have heretofore held that §1404(a) makes *the doctrine of forum non conveniens applicable to Federal Employers' Liability Act cases* brought in federal courts and provides for the transfer of such actions to a more convenient forum. Ex Parte Collett, 1949, 337 U. S. 55, 69 S. Ct. 944, 959, 93 L. Ed. 1207." (Emphasis supplied.)

In *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U. S. 180, 72 S. Ct. 219 (1952), Mr. Justice Frankfurter speaking for this Court said, p. 186 (S. Ct., p. 222):

> "And if the manufacturer is joined as an unwilling defendant in a *forum non conveniens*, he has avail-

able upon an appropriate showing the relief provided by §1404(a) of the Judicial Code. 62 Stat. 869, 937, 28 U. S. C. §1404(a), 28 U. S. C. A. §1404(a)."

Again in *Wells v. Simonds Abrasive Co.*, 345 U. S. 514, 73 S. Ct. 856 (1953), in a dissenting opinion, Justice Jackson, with whom Justices Black and Minton joined, said, at page 522 (S. Ct., p. 860):

> "28 U. S. C. §1404(a) authorizes certain transfers of any civil action from state to state for the convenience of witnesses or of parties, or in the interests of justice. *The purpose was to adopt for federal courts the principles of forum non conveniens.* Ex Parte Collett, 337 U. S. 55, 69 S. Ct. 944 L. Ed. 1207. These are broad and imprecise and involve such considerations as the state of the court's docket. Gulf Oil Corp. v. Gilbert, 330 U. S. 501, 67 S. Ct. 839, 91 L. Ed. 1055." (Emphasis supplied.)

The majority opinion did not discuss this matter nor disagree in any respect with *this* statement by the dissenters.

We have already pointed out that in *Ford Motor Co. v. Ryan*, 182 F. 2d 329 (C. A. 2, 1950), the Second Circuit viewed 1404(a) as a *forum non conveniens* codification and that the Sixth Circuit and the Court of Appeals for the District of Columbia came to the same conclusion.

Numerous District Courts have regarded the statute in the same light.

Rhodes v. Barnett, 117 F. Supp. 312 (U. S. D. C. S. D. N. Y. 1953);

Lehn & Fink Products Corp. v. Milner Products Co., 117 F. Supp. 320 (U. S. D. C. S. D. N. Y. 1953);

United States v. Switzer Bros., 115 F. Supp. 49 (U. S. D. C. N. D. Calif., S. D. 1953);

Duffy v. United States, 114 F. Supp. 881 (U. S. D. C. S. D. N. Y. 1953);

Faucette v. Lykes Bros., S. S. Co., 110 F. Supp. 287 (U. S. D. C. S. D. N. Y. 1953);
Markantonatos v. Maryland Drydock Co., 110 F. Supp. 862 (U. S. D. C. S. D. N. Y. 1953);
Wheeler v. Societe Nationale Des Chemins, Etc., 108 F. Supp. 652 (U. S. D. C. S. D. N. Y. 1952);
Ronson Art Metal Works v. Brown & Bigelow, 105 F. Supp. 169 (U. S. D. C. S. D. N. Y. 1952);
Jenkins v. Wilson Freight Forwarding Co., 104 F. Supp. 422 (U. S. D. C. S. D. N. Y. 1952);
Lynch v. Luckenbach S. S. Co., Inc., 104 F. Supp. 494 (U. S. D. C. S. D. N. Y. 1952);
McDaniel v. Drotman, 103 F. Supp. 643 (U. S. D. C. W. D. Ky. 1952);
Oritz v. Union Oil Co. of California, 102 F. Supp. 492 (U. S. D. C. S. D. N. Y. 1952);
Reade Shirts v. Commonwealth Ins. Co. of New York, 102 F. Supp. 941 (U. S. D. C. S. D. N. Y. 1952);
Federal Electric Products Co. v. Frank Adam Electric Co., 100 F. Supp. 8 (U. S. D. C. S. D. N. Y. 1951);
Nicol v. J. C. Penny Co., 97 F. Supp. 83 (U. S. D. C. E. D. Mich. 1951);
Mazinski v. Dight, 99 F. Supp. 192 (U. S. D. C. W. D. Pa. 1951);
Webster-Chicago Corp. v. Minneapolis-Honeywell Reg. Co., 99 F. Supp. 503 (U. S. D. C. D. Del. 1951);
Goodman v. Southern Ry. Co., 99 F. Supp. 852 (U. S. D. C. S. D. N. Y. 1951).

If, as has been demonstrated above, this Court, three Courts of Appeals, and numerous District Courts regard the statute as a codification of *forum non conveniens*, is it not reasonable to suppose that Congress thought the same when they enacted the statute? And, especially, is this not the true situation when Congress had the reviser's notes before them from the time that the section first appeared and "at every subsequent legislative step." *Ex Parte Collett*, 337 U. S. 55 at pp. 68, 69, 69 S. Ct. 944, 951 (1949).

This interpretation of section 1404(a) as a codification of the doctrine of *forum non conveniens* by this Court, the Courts of Appeals and the District Courts, with the only dissenting voice that of the Third Circuit, affirmatively demonstrates that the words of the statute in no wise render the principles to be applied as clear as the Third Circuit apparently believes, and that the Courts must turn to the reviser's note in order to determine the Congressional intent.

This reviser's note reads:

> "*Subsection (a) was drafted in accordance with the doctrine of forum non conveniens*, permitting transfer to a more convenient forum even though the venue is proper. As an example of the need of such a provision, see Baltimore & Ohio R. Co. v. Kepner, 1941, 314 U. S. 44, 62 S. Ct. 6, 86 L. Ed. 28, which was prosecuted under the Federal Employers' Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the Court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so." (Emphasis supplied.)

We respectfully submit that this note, the previous cases of this Court, the Courts of Appeals and the District Courts demonstrate beyond a shadow of a doubt that the settled principles and limitations of *forum non conveniens* were codified by the enactment of Section 1404(a) of Title 28.

II. Mandamus is a proper remedy where a Federal District Court Judge has been forced against his will to follow the erroneous ruling of his Court of Appeals and transfer a case under Title 28 U. S. C., Section 1404(a) where an appeal after the trial of the case is a clearly inadequate remedy and, indeed, provides no remedy at all.

Before analyzing the cases relating to mandamus it seems advisable to indicate precisely what the issue before the Court of Appeals for the Third Circuit was and what the exact issue before this Court is.

No attempt was or is being made to review the discretion of the district court judge. He has already said that if the stringent requirements of the doctrine of *forum non conveniens* found in the decisions of the Supreme Court prior to the statute are to be applied he would feel that none of the three cases could properly be transferred. Thus, the sole question is whether these limitations apply. If they do, the trial court judge would have exercised his discretion in favor of petitioners. If they do not he would exercise his discretion in favor of the transfer.

In order to determine whether mandamus should be available under such circumstances we start with the proposition that mandamus "against judges are drastic and extraordinary remedies." *Ex Parte Fahey*, 332 U. S. 258, 259, 260, 67 S. Ct. 1558, 1559 (1947). But this is not a be all and end all of whether or not mandamus is available. This court in *Ex Parte Fahey*, supra, went on to say, p. 260, S. Ct., p. 1559:

> "*These remedies should be resorted to only where appeal is a clearly inadequate remedy.* We are unwilling to utilize them as a substitute for appeal. As extraordinary remedies they are reserved for really extraordinary causes." (Emphasis supplied.)

Is appeal a clearly inadequate remedy in this situation? Of this there can be no doubt.

There is no initial appeal from an order granting or refusing a transfer: *Jiffy Lubricator Co. v. Stewart-Warner Corp.*, 117 F. 2d 360 (C. A. 4, 1949). Thus, the only appeal to be had would be *after* the trial of the actions. At that time any party would find it impossible to show prejudice. How as a practical matter can one meet such a burden of proof?

It is for this reason that five circuits have held that the remedy of the writ is available in cases involving transfer orders under section 1404(a). *Ford Motor Co. v. Ryan*, 182 F. 2d 329 (1950), where Judge Frank said at p. 330:

> "Judge Swan thinks we have no power to grant a writ of mandamus. Judge Hand and I think this the kind of interlocutory order with which this court can properly deal by way of such a writ, since should petitioners—the defendants—finally lose on the merits below, any error in the interlocutory order would probably be incorrectible on appeal, for petitioners could hardly show that a different result would have been reached had the suit been transferred. Nor, should petitioners win on the merits below, could they collect as costs the additional expenses to them, if any, due to the court's failure to order the transfer. We recognize that the dividing line is by no means entirely clear between the power of this court and its lack of power to issue the writ. But we think this a sufficiently 'extraordinary cause' to empower us to do so, if the district judge erred."

It was also relied upon in *Chicago R. I. & P. R. Co. v. Igoe*, 212 F. 2d 378 (C. A. 7, 1954) where that Court said, p. 381:

> "While a ruling on a motion under Section 1404-(a) to transfer is not an appealable order, Ford Motor Co. v. Ryan, supra; Jiffy Lubricator Co. v. Stewart-Warner Corp., 4 Cir., 177 F. 2d 360, *it is the type of order which may, absent the power of this court to correct it in any case, give rise to judicially sanctioned irreparable procedural injury.*" (Emphasis supplied.)

In *Atlantic Coast Line v. Davis*, 185 F. 2d 766, 768 (C. A. 5, 1950), the court said:

> "At the outset of our consideration of the propriety of the retransfer, we are faced with the ques-

tion of our jurisdiction either to issue the writ, or to consider the appeal. *We think it clearly apparent from the facts stated that this is an extraordinary cause, and that it is of a nature which renders the likelihood of any fair and effective correction of the action of the Court by subsequent appeal, if this should be determined legally necessary, highly improbable, if not impossible.*" (Emphasis ours.)

In *Wiren v. Laws*, 194 F. 2d 873, 874 (U. S. C. A. Dist. of Col., 1951), the court said:

"The order of transfer was issued in reliance on 28 U. S. C. §1404(a), which provides: 'For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.' It is urged at the outset that the order contemplated by the quoted statute is interlocutory in nature and may neither be appealed nor subjected to the review incidental to a mandamus proceeding. It is clear enough that the order is not appealable and we do not understand appellant to make any contention to the contrary. But the question of review by mandamus is one of first impression in this circuit, though it has been the subject of decision in several other circuits. The concensus of such decisions is that jurisdiction to issue the writ in aid of the reviewing courts' appellate jurisdiction exists where the grounds for transferring the cause are insufficient to support the order and to bring it within the terms of the statute. And so understood we are in agreement. *If we were to hold even unauthorized orders of transfer to lie beyond our control, the effect would be to deprive litigants of forums to which they are entitled.* The only appealable order which would ultimately issue in the wake of such disclaimer on our part would then be in the forum to which the cause had been trans-

ferred and perhaps only after the case had been disposed of on the merits. But see Magnetic Engineering & Mfg. Co. v. Dings Mfg. Co., 2 Cir., 1950, 178 F. 2d 866. Neither the statute nor the cases require such a result. We hold that an order of transfer pursuant to 28 U. S. C. §1404(a) may be reviewed in the light of the criteria customarily associated with mandamus and similar remedies." (Emphasis ours.)

See also *Shapiro v. Bonanza Hotel Co., Inc.*, 185 F. 2d 777, 779 (1950).

Indeed, upon appeal after a trial on the merits an appellant complaining of an order granting or refusing a transfer would be faced with Rule 61 of the Federal Rules of Civil Procedure which provides that the error concerning which he complains must be shown to be harmful. It would be impossible to show harm in a situation of this kind.

We recognize that this court zealously guards against the issuance of the extraordinary writ of mandamus and that the inconvenience, hardship and expense—to the judiciaries and the parties involved assuming the transfer order to be incorrect, is of little materiality since Congress has contemplated these difficulties and not provided for an appeal from an interlocutory order: *Bankers Life and Casualty Co. v. Holland*, 346 U. S. 379, 74 S. Ct. 145 (1954). And that if an erroneous transfer order could be corrected on appeal after the trial of a case, these difficulties would not be sufficient so that mandamus should issue. *But the plain indisputable fact is that*, in these case is it impossible for these petitioners to affect a correction by an appeal subsequent to trial—they simply could not show any prejudice resulting from the transfer order.

Bankers Life & Casualty Co. v. Holland, 346 U. S. 379, 74 S. Ct. 145 (1954), is not at all dispositive of the issue now before this court. First: Petitioner, in that case, admitted that an order finding improper venue and then

ordering a transfer was an order which could ". . . eventually . . . be reviewed on appeal from final judgment in the case." Second: The court said, S. Ct. p. 148:

> "Furthermore, whatever *'Judicial inconvenience and hardship' may exist here will remain, after transfer, within the realm of the same court of appeals which has denied the writ, since both of the districts are within that circuit;* and it is not clear that adequate remedy cannot be afforded petitioner in due course by that court to prevent some of the conflicts and procedural problems anticipated." (Emphasis supplied.)

Thus, in that case there was no showing that petitioner was without an available remedy.

The issue in that case was whether the court ordering the transfer had the power—a question always reviewable upon appeal after a final judgment and correctible without a showing of prejudice. The instant case concerns no such question regarding the existence of a power to transfer but merely a legal question dealing with the limitations upon that power. As before demonstrated, such question cannot effectively or, indeed, at all, be reviewed upon appeal after final judgment.

In *Chicago R. I. & P. R. Co. v. Igoe*, 212 F. 2d 378, (C. A. 7, 1954), Judge Lindley made this cogent distinction in holding that mandamus does lie to correct an order under Section 1404(a). The court there said, p. 381:

> "Respondent's principal reliance on Bankers Life & Casualty Co. v. Holland, 346 U. S. 379, 74 S. Ct. 145, is misplaced. There the court held that mandamus would not lie to review an order entered under 28 U. S. C. §1406(a). *Suffice it to say that that Section, unlike Section 1404(a), deals with a situation of total want of venue and is mandatory.* If venue is improper, the district court must *either dismiss* or *transfer* the cause to a court in which venue lies. If the court does neither, any judgment entered in the cause is *a nullity*, an *error correctible on appeal.*" (Emphasis supplied.)

See also *Gulf Research and Development Co., v. Leahy*, 193 F. 2d 302 (C. A. 3, 1951), cert. granted 343 U. S. 925, 72 S. Ct. 762 and affirmed per cur. by an equally divided court, 344 U. S. 861, where Judge Maris makes the same distinction between cases involving Section 1406(a) of Title 28 U. S. C. and cases involving Section 1404(a) of Title 28 U. S. C. He said at p. 305:

> "The petitioners argue that writs of mandamus have been granted by courts of appeals in cases involving the transfer of actions from one district to another and it cites a number of cases from various courts of appeals, including ours. *Those cases, however, have all involved transfers under Sec. 1404(a) of Title 28 U. S. C., the forum non conveniens section.* As we pointed out in Pennsylvania Turnpike Commission v. Welsh, 3 Cir., 1951, 188 F. 2d 447, 449, footnote 2, *these cases normally deal with an issue, the convenience of parties and witnesses, 'which in its nature must be reviewed before trial, if at all.'* It may, therefore, be, as some courts of appeals have held, that the remedy of mandamus should be available to prevent an abuse of discretion in such transfers. Moreover this court has held that mandamus is available in such a case to direct a district judge to exercise his discretion when he has declined to do so on the erroneous ground that the *statute does not give him discretionary power to make the transfer requested.*" (Emphasis ours.)

Thus, petitioners are here not seeking to substitute the writ of mandamus for an appeal but are asking for the writ as the *only* effective means of remedy available. If mandamus is an inappropriate remedy, *none* is available.

Section 6 of the Federal Employers' Liability Act (28 U. S. C. §56) gave these petitioners a substantial right to select the forum in which they wished their cases

to be tried. In *Boyd v. Grand Trunk Western R. Co.*, 338 U. S. 263, 70 S. Ct. 26, (1949) this court said, at page 28:

> "The right to select the forum granted in §6 is a *substantial right.*"

If District Court Judges in the Third Circuit are forced against their will to refuse to abide by the limitations of *forum non conveniens* in applying Section 1404(a) and if there is no remedy to petitioners available by mandamus, there is nothing remaining of the substantial right granted by §6.

CONCLUSION

Finally, we here do not seek mandamus against a District Court Judge who transferred or refused to transfer a case alleging that he abused his discretion. Rather, in essence, we asked the Court of Appeals to allow the District Court Judge to exercise his discretion within the principles he thought applicable—viz., within the principles of *forum non conveniens.* This the Court of Appeals refused to do. We now respectfully request this Court to state that the settled principles of *forum non conveniens* do apply in accordance with the Congressional intent, reverse the decision of the Court of Appeals and allow the district court judge to apply these principles according to his announced exercise of discretion.

Respectfully submitted,

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